Protecting judicial independence through appointments processes: a review of the Indian and South African experiences.

1. Introduction

Judicial appointments processes have attracted a significant amount of attention over the last two decades. The rise in interest in, and debate about, how judges are appointed has been attributed to a global increase in judicial power.[1] Where once judges were viewed as simply not being important enough for the manner by which they were selected to merit serious scrutiny, the expansion of judicial power has served to heighten political, scholarly and public interest in this issue.[2] Recent years have also witnessed a move toward judicial appointment commissions, at least in Commonwealth states. [3] The 2005 *Commonwealth Guidelines on the Three Branches of Government* (the *Latimer House Guidelines*) support an emerging view of commissions-based appointments processes as best practice.[4] Thus, whilst the Guidelines allow for the possibility of other processes, they also suggest that a judicial appointments commission be set up in states with no existing independent process.

If judicial appointments processes in Commonwealth states are viewed as existing along a spectrum with a general move away from executive control towards commission-based systems, the Indian approach to judicial appointments may be seen as an outlier. In India, judges have primacy in the judicial appointments process. The judiciary recommends nominees for judicial appointment to the President through its "collegiums" – made up of the Chief Justice (CJ) and two or four senior judges – and the President is bound by the decision of the Collegium.[5] By contrast, South Africa was one of the frontrunners in the move towards appointment by commission, with a Judicial Service Commission (JSC) consisting of senior representatives of the judiciary, the executive and the legal profession being created under the country's 1996 Constitution in a series of profound constitutional changes following the end of apartheid.

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1 Kate Malleson 'Introduction' in Kate Malleson and Peter Russell (eds) *Appointing Judges in an Age of Judicial Power* (Toronto University Press 2006) 3.

2 See, for example Malleson and Russell (n 1), J van Zyl Smit *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by the Bingham Centre for the Rule of Law 2015); Graham Gee and Erika Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (Taylor and Francis 2017); and Nuno Garoupa and Tom Ginsburg 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 *American Journal of Comparative Law* 103.

3 See Jan van Zyl Smit 'Judicial appointments in the Commonwealth: is India Bucking the Trend?' U.K. Const. L. Blog (7th Mar 2016) < https://ukconstitutionallaw.org/2016/03/07/jan-van-zyl-smit-judicial-appointments-in-the-commonwealth-is-india-bucking-the-trend/> accessed 12 November 2017.

4 Guideline II.I. <http://www.cpahq.org/cpahq/cpadocs/Latimer%20House%20Principles.pdf> accessed 12 November 2017.

5 'Recasting the Judicial Appointments Debate' Centre for Law and Policy Research Working Paper No. 1/2014 < http://www.nja.nic.in/P-950_Reading_Material_5-NOV-15/3.Judicial%20Appointments%20Debate.pdf > accessed 12 November 2017.

Despite representing vastly different ways of appointing judges, India's collegium system and South Africa's JSC have both come under fire for being unequal to the job of protecting judicial independence. In South Africa, there is increasing disquiet that the composition of the JSC[6] has allowed a powerful executive to exert undue influence over the appointment of superior court judges.[7] Allegations of executive dominance of judicial appointments – particularly appointments to the Constitutional Court – have dogged the South African judicial appointments system for some time. The appointment of the current Chief Justice Mogoeng Mogoeng in 2011 was especially fraught. Richard Calland notes that the main reason for Deputy Chief Justice Moseneke – an eminent jurist – being passed over twice for the position of CJ by President Zuma's administration is that he was quoted in 2008 as saying that he intended to use his remaining ten or twelve years as a judge to help create an equal society: 'It's not what the ANC[8] wants…it is about what is good for the people'.[9] The idea that potential candidates will find themselves consigned to the lower courts or kept out of the highest judicial positions if they are critical of the ruling party is extremely worrying, particularly in a country with no real opposition to the dominant political party.[10]

In India, the collegium system has resulted in a lack of transparency about selection criteria and widespread concern over weak judicial accountability. The absence of clear criteria for judicial selection has also left judicial appointments open to executive influence, the very thing that collegium system was purportedly aimed at preventing. Criticisms of this judicial control over judicial appointments[11] culminated in much-anticipated reform in 2014. However, in October 2015, the Supreme Court found the Constitution (Ninety-Ninth Amendment) Act, 2014 (99th Amendment) and the National Judicial Appointments Commission Act of 2014, which were intended to move the country to a commission-based process, to be unconstitutional on the basis that the proposed system would damage the independence of the judiciary. [12] The decision has met with a mixed response. On the one hand, that the promise of a more transparent judicial appointments system has not come to fruition is hugely disappointing.[13] On the

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6 Koos Malan 'Reassessing Judicial Independence and Impartiality against the Background of Judicial Appointments in South Africa' 2014 (17) 5 *Potchefstroom Electronic Law Journal* 1965, 1968-69.

7 See Cora Hoexter and Morné Olivier 'The Judicial Service Commission' in C Hoexter and M Olivier (eds) *The Judiciary in South Africa* (Juta 2014) 154, 169-70.

8 The African National Congress, South Africa's ruling party since 1994.

9 *The Zuma Years – South Africa's Changing Face of Power* (Zebra Press 2013) chapter 11.

10 See further, John McEldowney 'One-party Dominance and Democratic Constitutionalism in South Africa' (2013) J. S. Afr. L. 269; Samuel Issacharoff 'Constitutional Courts and Consolidated Power' (2014) 62 Am. J. Comp. L. 585, 604-08 especially; Mark Tushnet 'Preserving Judicial Independence in Dominant Party States', (2015-2016) 60 N.Y. L. Sch. L. Rev. 107.

11 See, for example, Prashant Bhushan 'Securing Judicial Accountability: Towards an Independent Commission' *Economic and Political Weekly*, Vol. 42, No. 43 (Oct. 27 - Nov. 2, 2007) 14; and Markandey Katju 'Let's make judges selection more transparent', *The Hindu* (Chennai, 3 January 2013) <http://www.thehindu.com> accessed 12 November 2017.

12 *Supreme Court Advocates-on-Record Association and others v Union of India and others*, WP (Cl) 13/2015 (Supreme Court, 16 October 2015).

13 See Raju Ramachandran 'Judicial Independence and the Appointment of Judges' DAKSH Fourth Annual Constitution Day Lecture, Indian Institute for Human Settlements (IIHS) Auditorium, 28 November 2015 <http://blog.dakshindia.org/2015/12/judicial-independence-and-appointment.html> accessed 12 November 2017.

other, even those broadly in favour of reform of the judicial appointments system found themselves reluctant to get behind the NJAC Act because of the fundamental concern that it did not do enough to insulate the commission process from executive control.[14] Whilst the decision was disappointing to those who have been pressing for a move towards a commission-based process in India for decades, the issues highlighted in the judgment are a timely reminder that the composition and functioning of a judicial appointments commission are matters that merit careful consideration.

It is here that the South African experience makes for illuminating comparative analysis and, it is argued in this article, is something of a cautionary tale. From a political perspective, India and South Africa are very different. The African National Congress (ANC) has been the majority party in South Africa since the first democratic elections in 1994. By contrast, 2014 was the first time in 25 years that a single party (the Bharatiya Janata Party) managed to secure a majority in India. India is a much more populous state with a GDP placing it within the six biggest economies in the world.[15] Whilst South Africa is an economic powerhouse regionally, its economic growth has been small by global standards. Where racial discrimination continues to be one of the most pressing social issues in South Africa, it is the caste system in India that has given rise to many diversity concerns. At the same time, there are good reasons why the comparison of judicial appointments processes in the two countries is useful. Historically, India's collegium and South Africa's JSC may both be said to be a response to executive intrusion into judicial appointments.[16] In both countries, the courts – the Supreme Court and Constitutional Court, in particular – have been active[17] in protecting the economic and social interests of those most marginalised in society, in the context of deep-seated and pervasive inequality. Strong judicial review powers are a feature of the judicial systems in both jurisdictions. Where judicial legitimacy is important in any jurisdiction, it is especially important that courts with such comparatively strong powers, be seen to be independent. Concerns about judicial diversity and the quality of judicial reasoning are features of both these systems. An appointments process that protects judicial independence, contributes to diversity and ensures that excellent candidates are nominated and selected is therefore vital.

Both countries are currently encumbered by flawed systems for judicial selection and appointment. In the case of South Africa, the composition of the JSC has led to a disturbing level of political influence over judicial appointments.[18] Later commissions in

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14 Indira Jaising 'National Judicial Appointments Commission: A Critique' *Economic and Political Weekly*, Vol. XLIX No. 35 (30 August 2014) 16, 18.

15 According to 2016 World Bank data. See <http://databank.worldbank.org/data/download/GDP.pdf> accessed 12 November 2017. South Africa was placed 38 in this ranking.

16 See further Granville Austin *Working a Democratic Constitution* (OUP 2003), chapter 25 and Morné Olivier 'The selection and appointment of judges' in Hoexter and Olivier (n 7) 116, 117-8.

17 Though not consistently so – see, for example, Anashri Pillay and Murray Wesson 'Recession, recovery and service delivery: political and judicial responses to the financial and economic crisis in South Africa' in A Nolan (ed) *Economic and Social Rights after the Financial Crisis* (CUP 2014) 335 and the text to note 70 below.

18 Though the transparency of certain aspects of the process has helped to mitigate the impact of this political pressure – discussed further below.

other jurisdictions have been more balanced in the sense that they are not dominated by members of the judiciary or by politicians.[19] But, for South Africa, the composition of the JSC may only be changed through constitutional amendment. This is unlikely to happen for as long as the ANC maintains its majority in Parliament.[20] Despite this fairly bleak assessment, it is worth noting the JSC has been responsive to forceful civil society demands that it publish clearer selection criteria and conduct interviews that are both fair and robust. In the absence of a more balanced commission, it is especially important that this insistence on a transparent and rigorous process be maintained.

Change to the collegium system in India has also proved elusive. The Indian Supreme Court's decision in the *NJAC* case suggests that there is a deep-seated reluctance to move away from judicial primacy in the appointments process. Furthermore, there is little clarity in the decision about the kind of commission-based process that would survive constitutional challenge. Thus, the shape of future reforms of the judicial appointments system in India is uncertain. The South African experience underscores the fact that a move to a commission-based process cannot, in itself, be considered a victory for judicial independence. Much more careful attention must be paid to achieving a balance in the composition of the commission. Ideally, legislation creating such bodies and detailing their procedures will also contribute greater clarity to selection criteria and promote transparency and rigour in judicial interviews. Where this is missing, it is important that civil society organisations, legal practitioners, scholars and the media all play a role in holding commissions to account for their decisions.

2. Historical background to appointments processes in India and South Africa

As noted above, India's collegium system and South Africa's JSC may both be seen as responses to concerns about political dominance over judicial appointments. The response in India was a move toward judicial primacy, which was not explicitly ordained in the Constitution. When the Constitution was enacted, the Constitutional Assembly was keen to ensure that the executive did not dominate the judicial appointments process but they also did not want the judiciary to function as a power unto itself.[21] Thus, a 'middle course'[22] was adopted. Under Article 124 (2), the President bears the responsibility for appointing judges to the Supreme Court but can do so only 'after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose'. In all appointments other than that of CJ, the sitting CJ must be consulted.[23] Similarly, under Article 217, the President appoints judges

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19 This balance has been achieved by including practising lawyers and lay persons on the commissions – see Jan van Zyl Smit '"Opening up" Commonwealth Judicial Appointments to Diversity? The Growing Role of Commissions in Judicial Selection' in Gee and Rackley (n 2) 68.

20 See Olivier (n 16) 152. See also Hoexter and Olivier (n 7) 172 on calls for, and proposals regarding reform of the JSC.

21 See, for instance, the statement made by B.R. Ambedkar, a principal drafter of the Constitution who went on to become India's first Law Minister, cited by Judge Khehar in the *NJAC* judgment (n 12) par. 30 (The Reference Order).

22 Ibid.

23 The Constitution of India, Art 124.

to the High Court 'after consultation with' the 'Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court'.

The key issue, of course, was what the duty to consult meant. The question initially came before the Court in *S.P. Gupta v. President of India*,[24] the *First Judges* case, in 1981. In that case, the Supreme Court judges noted that judicial independence was part of the basic structure of the Constitution and therefore could not be restricted by government.[25] The court went on to find, per Bhagwati J, that, when it came to appointments to the Supreme Court, full consultation with the CJ was imperative. Furthermore, it was to be expected that the opinion of the CJ, as head of the judiciary, would carry significant weight.[26] However, the Court was clear that the opinion of the CJ did not have primacy over those of other constitutional functionaries.[27] The central government was not bound to act consistently with the opinion of the members of the judiciary consulted in the process.[28] Acknowledging that leaving the appointment of superior court judges ultimately in the hands of the executive was not 'ideal', Justice Bhagwati went on to note that the system was preferred because it furthered accountability. The executive could be held to account to the legislature – and thus, indirectly, to the electorate – for its choices regarding judicial selection.[29]

However, when the Supreme Court next came to consider the matter in 1993, the judges took an entirely different approach. In the *Second Judges* case, [30] the majority held that, by making consultation with senior members of the judiciary an essential element of the President's power to appoint judges, the Constitution signalled a departure from the earlier process in terms of which the executive had absolute discretion over judicial selection.[31] For this departure to be meaningful and in order to 'eliminate political influence'[32] over the process, the executive could not be given the final say over the suitability of judicial candidates for appointment.

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24 AIR 1982 SC 149.

25 The basic feature or structure doctrine may be traced to *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and another* AIR 1973 SC 1461. In that case, the Court held that the legislative power to amend the Constitution was limited to the extent that an amendment could not violate one of the basic features or the basic structure of the Constitution. The court found that the separation of powers amongst legislative, executive and judicial arms of government were basic features of the Constitution. In the later case of *State of Rajasthan v Union of India* AIR 1977 SC 1361, the Court found that the independence of the judiciary was a basic feature of the Constitution. See, further, O. Reddy *The Court and the Constitution of India: Summits and Shallows* (OUP 2008) at 61-64.

26 *First Judges case* (n 24) par. 30.

27 Ibid. In reaching this conclusion, Bhagwati J referred to Ambedkar's description of a transfer of power to the CJ as a 'dangerous proposition' - *First Judges case* (n 24) par. 29.

28 *First Judges case* (n 24) par. 29.

29 Ibid.

30 *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441 par. 41 (per Justice Verma for the majority).

31 *Second Judges case* (n 30) par. 37 (per Verma J).

32 *Second Judges case* (n 30) par. 40 (per Verma J).

Having rejected the idea of the executive exercising a determinative voice over judicial appointments, the court noted:

> The primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise when the decision is reached in this manner by consensus, without any difference of opinion. However, if conflicting opinions emerge at the end of the process…primacy must…lie in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable.[33]

This effective judicial primacy was endorsed in 1998 when the Supreme Court handed down an Advisory Opinion in the *Third Judges* case[34] prescribing a distinct process of appointment of judges to the senior courts. The Court held that, for appointments to the Supreme Court, the Chief Justice of India's recommendation, which has primacy, must be made in consultation with the 'four seniormost puisne Judges in the Supreme Court'. For High Court appointments, the CJ had to consult with the 'two seniormost puisne Judges of the Supreme Court'.[35] These consultative groups, referred to as collegiums, have since acted as the vehicle through which senior court judges are selected.

That the Supreme Court could depart from the reasoning in the *First Judges* case and, as some have argued, effectively 'rewrite'[36] the Constitution by transferring the power of judicial selection to the judges themselves seems remarkable. However, these developments must be read against the political and constitutional climate in the decades following the 1975-77 state of emergency. Whilst it effectively upheld executive control over judicial appointments, the decision in the *First Judges* case was handed down in the context of an 'ever-simmering' debate about judicial independence.[37] Government's actions with respect to the supersession of and transfer of judges immediately before and during the Emergency meant that post-emergency governmental policies with respect to the judiciary were treated with a high degree of suspicion by judges, lawyers and the members of the public.[38]

This suspicion was heightened by several events from the mid-1980s contributing to the perception of governmental disdain for judicial independence. Austin notes that the Law Minister, expressed approval for the possibility that the chief justice of each high court be appointed from outside its jurisdiction. Government statements suggested that it favoured greater movement of judges. Rather than consulting with the High Court's chief justice, the governor of Uttar Pradesh wrote to the Law Ministry, indicating that the extension of Justice Srivastava's appointment was undesirable. For his part, Justice

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33 *Second Judges case* (n 30) par. 41 (per Verma J).

34 *Special Reference No. 1 of 1998* (1998) 7 SCC 729. The government of India was not seeking to overturn the decision in the *Second Judges* case but merely asked for clarification on matters of process. See further Arghya Sengupta 'Judicial Independence and the Appointment of Judges to the Higher Judiciary: A Conceptual Enquiry' (2011) 5 *Indian Journal of Constitutional Law* 99, 103-4.

35 Working paper (n 5) 3-4.

36 Working paper (n 5) 3. See also Reddy (n 25) 305.

37 Austin (n 16) 517.

38 Ibid.

Srivastava made it clear that he considered the short renewal of his tenure to be connected to the fact that he represented Raj Narain in a case brought against Indira Gandhi for election fraud before the declaration of emergency in 1975.[39] A series of transfers of judges emanating from correspondence between Chief Justice Chandrachud and Shiv Shankar as well as disputes regarding tenure placed additional pressure on the situation leading to increased calls for an impartial appointments and transfer process.[40] By the time the *Second Judges* case came to be decided, and following criticisms of the *First Judges* case as being overly deferential to an executive keen on encroaching into the judicial domain,[41] the political context had changed enough to allow the judges to act decisively in securing judicial primacy over appointments.

South Africa's move to a commission-based appointments system arose several decades later, following the dismantling of apartheid in the mid-1990s. The establishment of a JSC, independent from government and responsible for the selection of judicial candidates, was one of many fundamental changes effected by South Africa's 1996 Constitution. Under apartheid, judicial appointments were an executive affair. The processes for appointment of judges were largely based on those inherited from the former colonial power, the United Kingdom. Judges were appointed by the President acting on the advice of the Minister of Justice.[42] The system was heavily criticised. As stated by Hugh Corder during the country's transition to a democratic form of government:

> First, it is clear that the present informal, secret and unaccountable method employed in South Africa will have to disappear, not only because it is secret and substantially unregulated by the law, but also because it is susceptible to abuse and political pressure and because it has been abandoned in almost every other country.[43]

Studies conducted under apartheid demonstrated that judges were excessively willing to uphold executive action at the expense of individual freedoms. Many judges supported the system of apartheid. Furthermore, there were 'a number of very obviously political appointments' to the bench, used as a means for Government to sustain its discriminatory policies. [44] Thus, where fears of a lack of respect for judicial independence informed the development of the collegium system in India in the 1980s, the move to a JSC in South Africa was precipitated by more blatant political interference with appointments by apartheid governments.

The introduction of a commissions-based system for judicial appointments in South Africa was welcomed both as part of a general trend towards a 'culture of

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39 These and other events are described in detail by Austin (n 16) 517-21.

40 Austin (n 16) 521-3.

41 Reddy (n 25) 304. Reddy argues that, by this time, the Supreme Court had realised the 'great mistake it had committed in the *First Judges case*'.

42 François Du Bois 'Judicial Selection in Post-Apartheid South Africa' in Malleson and Russell (n 1) 280, 283.

43 'The Appointment of Judges: Some Comparative Ideas' (1992) (2) *Stellenbosch Law Review* 207, 226.

44 Geoffrey Bindman 'Preliminary Report on South Africa' (1987) 38 *International Commission of Jurists Review* 31, 46. See also Olivier (n 16) 118-20.

justification'[45] and as an attempt to address specific concerns over judicial independence. Given the country's history of discrimination, diversification of the judiciary was also an immediate priority. The Constitution requires that the 'need for the judiciary to reflect broadly the racial and gender composition of South Africa' be considered in the appointments process.[46] The procedures for the appointment of judges to the higher courts are set out in section 174. The CJ and Deputy Chief Justice are appointed by the President 'after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly'.[47] The President appoints the President and Deputy President of the Supreme Court of Appeal after consulting with the JSC.[48] Other judges of the Constitutional Court are appointed by the President according to the following process:

> a. The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President b. The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made c. The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.[49]

Finally, judges of other courts are appointed by the President on the advice of the JSC.[50] Thus, the JSC is a 'hybrid' institution in the sense that it has the power only to make recommendations to the President in certain cases but also has the power to decide on nominees for the positions of ordinary Constitutional Court Justices.[51]

Of course, the composition of the JSC is key to any discussion of judicial independence. Section 178 of the Constitution provides:

1. There is a Judicial Service Commission consisting of
a. the Chief Justice, who presides at meetings of the Commission;
b. the President of the Supreme Court of Appeal;
c. one Judge President designated by the Judges President;
d. the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
e. two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
f. two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
g. one teacher of law designated by teachers of law at South African universities;
h. six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
i. four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
j. four persons designated by the President as head of the national executive, after consulting

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45 Etienne Mureinik A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32

46 Section 174 (2).

47 Section 174(3).

48 Ibid.

49 Section 174 (4).

50 Section 174 (6).

51 Du Bois (n 42) 285.

the leaders of all the parties in the National Assembly; and
k. when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them.

Whilst the JSC is formally separate from the executive, the manner of its composition 'would ordinarily secure a dominant position for the ruling party'.[52] Twelve of the twenty-three members of the Commission normally part of the decision-making process are politicians appointed by the President[53] who is both Head of State and Head of the National Executive.[54] When there are vacancies to be filled, the JSC publishes a notice providing details of these and asking for nominations. It then shortlists appropriate candidates and asks them to attend an interview. There is an opportunity for public comment or representations to be made to the JSC before the interviews. Importantly, the interviews are held in public but deliberations and decision-making are conducted in private.[55]

The South African model has been praised as having many positive attributes.[56] Whilst transformation of the demographic make-up of the judiciary remains a challenge for the JSC, [57] particularly with the higher Courts, significant progress has been made since 1994.[58] According to Department of Justice statistics, black judges ('African', 'Coloured' and 'Indian') made up 63% of the bench in 2014, with African judges constituting 44% of that group. This is a definite improvement on the 57% of black judges, including 39% African judges, in 2009. Achieving greater gender diversity has been a slower process, with the number of women on the bench increasing from 23% in 2009 to 32 % in 2014.[59] These achievements are particularly notable when one considers that in 1994, 160 of the 165 judges on the South African bench were white men.[60] The

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52 Malan (n 6) 1968-69.

53 Ibid.

54 See, further, Hoexter and Olivier (n 7)167-8. They note that the preponderance of executive members is inconsistent with the trend with respect to the composition of commissions in African states and the rest of the world.

55 For a more detailed summary of the process, see Penny Andrews 'The South African Judicial Appointments Process' (2006) 44 *Osgoode Hall Law Journal* 565, 568-9; Olivier (n 16) 123-31.

56 See, for instance Jeffrey Jowell 'The Appointment and Accountability of Judges' Helen Suzman Foundation lecture <http://hsf.org.za/siteworkspace/hsf-justice-lecture.pdf> accessed 12 November 2017. See also Andrews (n 55) 569.

57 A full discussion of the meaning of diversity and arguments for its importance are beyond the scope of this article. See, further, Morné Olivier 'A Perspective on Gender Transformation of the South African Judiciary' (2013) 130 *S. African L.J.* 448; and Erika Rackley 'In Conversation with Lord Justice Etherton: Revisiting the Case for a More Diverse Judiciary' (2010) *Public Law* 655.

58 See Du Bois (n 42) 287; P De Vos 'Judicial transformation: South Africa's appalling non-commitment', *Daily Maverick*, 22 January 2013,<http://www.dailymaverick.co.za/opinionista/2013-01-22-judicial-transformation-south-africas-appalling-non-commitment/#.V3-Vn1du5SU> accessed 12 November 2017; and Andries Nel 'The Legal Practice Bill and the Transformation of the Legal Profession', 10 May 2013 <http://www.justice.gov.za/docs/articles/20130510-dm-tranformation.html> accessed 12 November 2017.

59 Nomthandazo Ntlama 'The Transformation of the South African Judiciary: a Measure to Weaken its Capacity?' at 9 <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/10/Ntlama.pdf> accessed 12 April 2017. Statistics for the demographic profile of the Constitutional Court and the Supreme Court of Appeal are available at 10-11. See further Olivier (n 11).

60 Ibid. See also Nel (n 58).

transparency of the selection and appointment process and the enhanced accountability that stems from this is another of the JSC's merits. As Du Bois comments:

> Twice a year, the JSC conducts well-publicized open interviews, following widely-distributed calls for applications for judicial vacancies and published lists of candidates inviting comments. It consults with, and elicits views from, the judiciary and legal profession, and its proceedings and decisions are reported and commented on in the media.[61]

Given the composition of the JSC, the potential for executive influence over judicial appointments is clear. But it is also important to note that South Africa's commission was the product of a late political compromise. Hoexter and Olivier provide a salutary reminder that, at one point, the proposal was that the JSC have no role in the appointment of Constitutional Court judges.[62] Thus, whilst the composition of the JSC is not ideal, it was perhaps the best option that could have come out of the constitutional negotiations. In contrast to India, the detailed provisions in the South African Constitution also meant that the appointments process was constitutionally fixed and not open to interpretation by the Constitutional Court.

3. The case for reform

In light of the historical context sketched above, both the move to a collegium system in India and the introduction of a JSC in South Africa may been seen as victories for judicial independence. However, there are convincing arguments for reform of the current judicial appointments systems in both countries. Writing shortly before the *Third Judges* case was decided, leading Indian constitutional law scholar S.P. Sathe noted that proposals for a judicial selection commission had already been under discussion for some time. Such a commission would have had a range of constitutional actors as members and would have conducted the appointment, transfer and removal of judges according to a clear set of rules. Sathe argued that judicial accountability was as important as judicial independence and that, to further this accountability, '[t]he people must know who are appointed as judges and what are the criteria for such appointments.' [63] The problem with a judge-dominated process is that it does not do enough to protect this accountability and is, therefore, anti-democratic.[64] In the intervening years, the issue of a lack of transparency and accountability has been an enduring critique of the Indian judiciary.[65] Furthermore, various controversies over appointments to the Indian courts indicate that the primary rationale for self-selection – protection of judicial independence – is not necessarily served by the current process. Chief Justices are not immune from executive

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61 Du Bois (n 42) 288.

62 Hoexter and Olivier (n 7) 156.

63 SP Sathe 'Appointment of Judges: The Issues' *Economic and Political Weekly* Vol. 33, No. 32 (Aug. 8-14, 1998) 2155, 2157.

64 Ibid.

65 Supriya Routh 'Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary' (2014) 13 *Washington University Global Studies Law Review* 321, 342. See also Bhushan (n 10); Abhinav Chandrachud 'The Insulation of India's Constitutional Judiciary' *Economic and Political Weekly*, Vol. 45, No. 13 (March 27-April 2, 2010) 38.

influence and the existing system contains no means by which they can be checked if they do give in to political pressure.[66]

Even where the CJ or other senior judges are themselves resistant to political influence over the appointments decisions, without clear criteria and a transparent process for appointment there are other means by which the executive can interfere. The treatment of Gopal Subramanian, who the Supreme Court collegium was considering for appointment to the Supreme Court in 2014, illustrates the point. Subramanian's involvement in certain cases – particularly those in which he represented the Central Bureau of Investigation (CBI) – made him unpopular with the Bharatiya Janata Party-led National Democratic Alliance government. The government effectively thwarted his appointment by instigating a 'smear campaign' in the media.[67] The collegium had unanimously recommended Subramanian for appointment. The standard procedure would have been for the government to send the nomination back to the collegium. If the collegium had then reiterated the decision, the government would have been compelled to make the appointment. Instead, government simply delayed. Believing that these actions had the support of the CJ, Subramanian withdrew his consent to his nomination and refuted the allegations made against him. [68]

It should be borne in mind that the Indian judiciary has also struggled with a lack of diversity. Whilst there has been some attempt to ensure geographical diversity on the bench, the Supreme Court is largely homogenous in terms of gender, race and caste.[69] Finally, vast inconsistencies in approach amongst judges on the Supreme Court, in particular, have cast a shadow over its jurisprudence in recent years.[70] This is not to say that the judges of the Supreme Court need to speak with one voice. What Nick Robinson refers to as the court's 'polyvocality' has certain benefits, such as allowing the judges an unusual capacity for innovation.[71] Increasingly, however, commentators are objecting to more fundamental discrepancies amongst judgments.

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66 Nirmalendu Bikash Rakshit 'Judicial Appointments' *Economic and Political Weekly*, Vol. 39, No. 27 (Jul. 3-9, 2004) 2959, 2960. See also Prashant Bhushan 'The Dinakaran Imbroglio: Appointments and Complaints against Judges' *Economic and Political Weekly*, Vol. 44, No. 41/42 (October 10-23, 2009) 10.

67 Prashant Bhushan 'Scuttling Inconvenient Judicial Appointments' *Economic and Political Weekly*, Vol. XLIX No. 28 (July 12, 2014) 12.

68 Bhushan (n 67) 12-13.

69 Abhinav Chandrachud 'Age, seniority, diversity' *Frontline*, Vol. 30 (8) (20 April–3 May 2013) <http://www.frontline.in/cover-story/age-seniority-diversity/article4613881.ece> accessed 12 November 2017. See also Chandrachud *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (OUP 2014) 257-8.

70 JK Krishnan, 'The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India' (2003) 25 *Human Rights Quarterly* 719, 791-819; S Shankar and P Mehta 'Courts and Socioeconomic Rights in India' in V Gauri and D Brink (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008) 146; and Anashri Pillay 'Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 339.

71 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61 *American Journal of Comparative Law* 173, 184-86 and 188.

In a 2013 article for the Indian news and current affairs magazine *Frontline*, Mohan Gopal[72] argued that the courts' approach to social change has changed dramatically since 1991. He noted that 'courts are not as forthcoming or responsive as they used to be in defending the causes of the poor'.[73] The courts – and the Supreme Court, in particular – appear to have embraced a model of social change that focuses on 'market-based economic growth' rather than the 'redistribution of wealth or breaking down social oligopolies as envisaged in the Constitution'.[74] And despite arguing that there is a general coherence to the Supreme Court's judgments, Robinson also notes that '[i]n public interest litigation, certain judges are known for intervening aggressively when they see lapses in governance, while others rarely sanction intervention.'[75]

These inconsistencies cannot simply be laid at the door of the judicial appointments system. The number of Supreme Court judges is unusually high. There are currently 25 sitting justices on the bench, including the Chief Justice. The relaxed rules of standing and a liberal approach to admissibility of cases has resulted in a large case-load. Many judgments are now being handed down by two-judge Division Benches: '[a]s the pool of precedent has grown, courts and counsel have been unable to keep pace with such growth, which inevitably leads to inconsistency in the law.'[76] The judicial appointments process may not be as significant a contributor to inconsistency as these other factors. But judicial inconsistencies add fuel to concerns about the opacity of the appointments system. And this, in turn does damage to judicial legitimacy.

Despite the heightened transparency of the system and greater demographic diversity of the bench in South Africa, there is also increasing disquiet over threats to judicial independence related to the manner in which judges are appointed. Penny Andrews notes that 'concern has been raised about the nature of the sifting process and the shortlisting of candidates by the sub-committee of the JSC. Since the names of those who are nominated, but not shortlisted, are not published, questions have been raised about how the choices are made and whether political and other inappropriate influences play a part in the decision.'[77] The JSC's appointments have been critiqued from the very early years of its existence.[78] A significant amount of this criticism stems from a perceived tension between the broad criteria for appointments recognised by the Constitution, that is that the candidate must be an 'appropriately qualified woman or man

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72 Former Director of the National Judicial Academy and former Vice-Chancellor of the National Law School of India University (Bangalore).

73 'Supreme Court and the aam aadmi' *Frontline* Vol. 30 (8) (April 20-May 3 2013) <http://www.frontline.in> accessed 7 November 2014.

74 Ibid. See also Balakrishnan Rajagopal 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 18 *Human Rights Review* 157, 160.

75 Robinson (n 71) 185. See also S Muralidhar 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate' in Yash Ghai and Jill Cottrell (eds) *Economic, social and cultural rights in practice: the role of judges in implementing economic, social and cultural rights* (Interights 2004) 23, 31.

76 A Sengupta 'Inconsistent decisions' *Frontline* Vol. 30(8), 3 May 2013 http://www.frontline.in accessed 12 November 2017.

77 Andrews (n 55) 569.

78 Malan (n 6) 1970.

who is a fit and proper person' and the constitutional imperative that racial and gender diversity be taken into account in the selection process. But diversity of the bench is a priority not just because it lends greater legitimacy to judicial decisions; it also leads to better decision-making, decision-making that is responsive to the lived experiences of more than a small slice of the population.[79] It is important, then, that we separate criticisms of the JSC's appointments that are based purely on a resistance to the very idea of demographic transformation of the bench from those that are based on a concern that appointments are being made based on how 'compliant' the individuals are likely to be to governmental preferences. As Geoff Budlender points out:

> There is no need for us to feel any squeamishness about the proposition that the judiciary should more clearly reflect who we are. Those considerations are and always will be very significant. In the United Kingdom serious work is now being done to attempt to achieve a more 'representative' judiciary. The need for a broadly representative judiciary is underlined in a society such as ours, which is still so deeply divided on racial grounds.[80]

In South Africa, as elsewhere, there is heated debate about what constitutes 'merit' for the purposes of appointing candidates to the judiciary. Experience is often used as a proxy for merit. But, as a consequence of the apartheid government's discriminatory laws and practices, those people with the most experience in the legal profession have tended to be white and male. The JSC could not hope to make any serious inroads in terms of diversifying the judiciary if they simply continued to appoint judges on the basis of their experience. These tensions came to the fore in 2013 when Izak Smuts, a commissioner on the JSC, released a discussion document in which he criticised the JSC's application of its appointment criteria particularly on the issue of transformation.[81] His view, which attracted censure from his colleagues on the JSC, the CJ, other judges and the Black Lawyers Association[82] was that transformation of the bench was not mandated by the Constitution and that the goal of a more representative bench was only a secondary factor to be considered in judicial appointments.[83] Whilst few would take issue with Smuts' argument that only appropriately qualified individuals should be appointed to the bench and that appointments cannot be made on the basis of demographics alone,[84] by refusing to acknowledge transformation of the bench as a constitutional goal at all, Smuts made it easy for detractors to dismiss his more cogent concern with the JSC's reluctance to appoint independent-minded judges.[85]

As is pointed out by Budlender, the fact that the word 'transformation' does not

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79 Geoff Budlender 'Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa' 2005 (122) 4 *South African Law Journal* 715, 717; Sandile Ngcobo 'Sustaining Public Confidence in the Judiciary: An Essential Condition for Realising the Judicial Role' 2011 (128) *South African Law Journal* 5, 10-11.

80 Budlender (n 79) 717.

81 The report is available at <http://www.politicsweb.co.za/news-and-analysis/the-judiciary-do-white-males-not-need-apply> accessed 9 April 2017 and discussed in Malan (n 6) 1975.

82 Malan (n 6) 1976-77.

83 Malan (n 6) 1975.

84 Something the JSC itself acknowledges in the criteria for appointment published in 2010, see below.

85 See interview with Izak Smuts SC regarding his resignation from the JSC at the University of Cape Town Law Faculty, 20 April 2013 <https://contextsblog.wordpress.com/2013/04/20/interview-with-izak-smuts-sc-regarding-his-resignation-from-the-jsc/> accessed 12 November 2017.

appear in the Constitution does not diminish the Constitution's very clear ambition that South Africa has a judiciary which is representative of the demographic profile of its people.[86] Attacks on the transformation agenda itself are unsustainable because they contradict this constitutional goal. It is, furthermore, unfortunate that so much of the debate about the South African appointments process tends to be reduced to arguments about the extent to which race and gender are relevant to appointments processes as this shifts the focus away from very serious concerns with judicial independence. The appointments process needs to be robust enough to ensure that qualified candidates – of whatever race and gender – who will exercise their constitutional mandate independently of political influence are appointed to the bench. The preoccupation with race and gender also detracts from the broader transformative mission of the Constitution that is, the move toward a legal system based on values of substantive equality, dignity and freedom. As noted by Budlender, [i]n appointing judges we therefore need to make a fundamental issue the assessment of whether they are seriously committed to the profound social transformation which is required by the Constitution.'[87] The question then arises of how best to ensure that the appointments process does a thorough job of assessing commitment to key constitutional values.

Increasingly, commentators in India are also calling for judicial appointments processes to provide a platform through which judges may be publicly questioned about their understanding of, and commitment to, these values.[88] Gopal[89] and Ramachandran[90] are both swift to clarify that this does not mean that judges are required to adhere to any particular social philosophy. However, it is important that the judicial selection process take into account the record of candidates in upholding constitutional ideals. As to what these ideals are, Gopal suggests that they 'must include, at the very minimum, demonstrated faith in justice (social, economic and political), equality, liberty, dignity and the ideas of democracy, socialism and secularism as laid down in the Constitution'.[91] As noted by Olivier in the South African context, the question of how to measure a candidate's commitment to constitutional values is complex.[92] An appointments process that provides the kind of platform described here will not, in and of itself, lead to a more consistent approach to adjudication. But it will contribute to a culture of justification and allay escalating concerns about the accountability of judges and the legitimacy of their decisions.

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86 Budlender (n 79) 716.

87 Budlender (n 79) 720. See also See Pierre de Vos 'Time to talk about the appropriate political role of the JSC' <http://constitutionallyspeaking.co.za/time-to-talk-about-the-appropriate-political-role-of-the-jsc/> accessed 12 November 2017 and Olivier (n 118) 451.

88 Bhushan (n 67) 12. See also Jaising (n 7) 19.

89 Supra n 48.

90 Supra n 5.

91 Gopal (n 49).

92 Olivier (n 11) 147.

4. Steps toward reform: constitutional amendment and civil society intervention

Of the two countries, India has seen the more radical recent attempt at reform in the shape of the constitutional amendment and the NJAC Act mentioned above. The NJAC legislation was not the first attempt at reforming the system for judicial selection and appointment.[93] In spite of the increasingly forceful demands for change in this area, it was only in 2014 that there was sufficient governmental consensus, for new legislation to be passed. This was because the 2014 election had given India its first single-party majority government in 25 years. The Judicial Appointments Commission put forward in the legislation would have consisted of the Chief Justice of India, two other senior-most Supreme Court judges, the Union Law Minister, and two eminent persons to be nominated by the Prime Minister, CJ and Leader of the Opposition in Parliament. set out the procedure to be adopted by the Commission 'for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto'. Section 5 (2) of the Act stated that '[t]he Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.' With respect to High Court appointments, the Act contained similar clauses allowing for 'other criteria of suitability as may be specified by regulations' to be applied by the Commission and preventing the Commission from putting forward a name where two members disagreed with the recommendation. The legislation met with a lukewarm reception. Indira Jaising notes:

> Union Law Minister Ravi Shankar Prasad never tires of stating that the bills fulfil a 24-year-old demand. This contention is far from true. The long-standing demand has been for transparency and public participation, greater representation for women, minorities, scheduled castes and scheduled tribes. The bills introduced in Parliament do not address any of these.[94]

A particular issue was the effective power of veto under section 5 of the Act that any two members of the Commission could exercise over recommendations. Thus, the Law Minister could exercise this power with one of the 'eminent persons'. As the Act provided no guidance as to who would qualify as an 'eminent person' it was conceivable that this could be someone close to the executive.[95] Indeed, the implications of section 5 for judicial independence featured as one of the main reasons why the Supreme Court found the NJAC Act to be unconstitutional.[96]

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93 See Jaising (n 7) 18; and M. Ershadul Bari 'Collegium System of Appointment of Superior Courts' Judges Established in India by Way of Judicial Interpretation and the Aftermath: A Critical Study, (2013) 18 Lawasia J. 1, 16.

94 Jaising (n 7) 18.

95 Ibid.

96 See the discussion of the judgment in section 4 below. For a summary and critique, see Arghya Sengupta 'Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment' *Economic and Political Weekly* Vol. l No. 48, 28 November 2015, 27.

The principal flaws in the NJAC legislation may be divided into four, related categories: first, threats to judicial independence; second, inadequate attention paid to measures for diversification of the Bench; third, concerns related to impracticability and, fourth, a lack of transparency and accountability. Amongst the various criticisms of the Acts, the 'veto' clauses attracted a wide degree of condemnation. As noted earlier, the effect of these clauses was that any two members of the NJAC could have prevented the nomination of a candidate. Thus, for instance, the Union Law Minister, acting with one of the 'eminent persons' could stymie a particular nomination. The two eminent persons were to be selected by the Prime Minister, CJ and Leader of the Opposition in Parliament and there was no guidance in the legislation as to what counts as 'eminence'. Consequently, it was conceivable that the government could place pressure on the CJ in the selection of 'eminent persons' adding to the capacity of the executive to dominate the appointments process. [97]

A further concern was that the legislation allowed the NJAC to overlook the seniority principle in the appointment of the CJ on the grounds of a lack of merit or ability. There may be good reasons for superseding the senior-most judge when appointing the CJ.[98] However, '[i]n the absence of any methodology for judging ability and merit, this provision could end up packing the judiciary with "friendly" judges.'[99] The fact that the legislation conferred wide Parliamentary powers to change the criteria and process for judicial selection also set alarm bells ringing over the potential extent of governmental control over judicial appointments.[100]

With respect to diversity, the clause requiring that one of the 'eminent' persons be 'nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women' was a step in the right direction. However, merit and ability remained the primary selection criteria together with others that may be specified in regulations. The lack of engagement with what 'merit' and 'ability' mean in the context of judicial office is problematic. Jaising notes that the 'merit' criterion has historically been used to exclude marginalised members of society from the Bench. Furthermore, she notes that the legislation did not even contain a 'statement of intent' recognising the need to make diversity a priority in judicial selection.[101]

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97 See Jaising (n 14) 18; Khagesh Gautam 'Constitutionality of the National Judicial Appointments Commission: The Originalist Argument', <http://www.nja.nic.in/P-950_Reading_Material_5-NOV-15/4.%20Khagesh%20Gautam.pdf> accessed 12 November 2017; C Raj Kumar and Khagesh Gautam 'Questions of Constitutionality - The National Judicial Appointments Commission', *Economic and Political Weekly*, 27 June 2015.

98 To enhance continuity on the bench for instance – see Pillay (n 70) 354.

99 Jaising (n 14) 18.

100 Smaran Shetty 'Questioning the National Judicial Appointments Commission Act, 2014' <https://lawandotherthings.blogspot.co.uk/2014/08/questioning-national-judicial.html> accessed 12 November 2017. See also Manoj Mate 'A Challenge to Judicial Independence in India: The National Judicial Appointments Council (NJAC)', Jurist (23 July 2015) <http://www.jurist.org/forum/2015/07/manoj-mate-judicial-independence.php> accessed 12 November 2017.

101 Jaising (n 14) 18.

Apart from their potential impact on judicial independence, the clauses allowing any two members of the NJAC an effective veto over a candidate's selection have also been critiqued on the basis that they could impede judicial appointments in general. Kumar and Gautam refer to the possibility of a constitutional crisis precipitated by repeated exercises of the veto power by two members of the NJAC and made more likely by the fact that the legislation did not give any guidelines as to what an appropriate reason for rejecting a candidate would be.[102] In addition, the NJAC legislation contained no guidelines for resolving conflicts between the rules emanating from the JAC and those determined by central government.[103]

Finally, a lack of transparency pervaded the legislation itself and the overall result was that the NJAC system for judicial appointments was only slightly less opaque than that of the collegium. In addition to the fact that the legislation provided no clarity around the meaning of 'eminent' person or any guidelines as to how merit and ability would be assessed, the Acts did not contain any provisions requiring public participation[104] in the form of inviting members of the public or interested professional bodies to comment on proposed candidates or in the form of a public interview process for prospective judges, for instance. The legislation also did not contain any clauses, such as one creating a complaints mechanism, designed to enhance judicial accountability.[105]

For these reasons, the Supreme Court's decision that the NJAC legislation was unconstitutional was welcomed in many quarters.[106] At the same time, the Court's reasoning in the judgment has come under fire from various commentators, including some who were themselves critical of the legislation.[107] The judgment is long and complex. Detailed summaries of the court's treatment of all the issues are available elsewhere.[108] The focus here is on the court's *dicta* regarding judicial independence.

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102 Kumar and Gautam (n 97).

103 Shetty (n 100).

104 See the 'residuary clause' – section 11(2)(c). See also Jaising (n 14); and Shetty (n 100).

105 Jaising (n 14) 18. See also 'Sunlight is the best disinfectant' *Economic and Political Weekly Editorial*, 30 January 2010.

106 See, for instance, Pratap Bhanu Mehta 'A lesser evil: Collegium has grave deficiencies, but it compromises structural independence of judiciary less', *The Indian Express*, 17 October 2015, <http://indianexpress.com/> accessed 12 November 2017; Ajoy Ashirwad Mahaprashasta 'The NJAC is a cure worse than the disease' interview with Prashant Bhushan, 13 November 2015 <http://www.frontline.in> accessed 12 November 2017 (Bhushan appeared for the Supreme Court Advocates-on-Record Association in the case).

107 For example, Gautam Bhatia 'The NJAC Judgment and its Discontents', 16 October 2015, <https://indconlawphil.wordpress.com/2015/10/16/the-njac-judgment-and-its-discontents/> accessed 12 November 2017; Chintan Chandrachud 'Debating the NJAC Judgment of the Supreme Court of India: Three Dimensions' U.K. Const. L. Blog, 3rd Nov 2015 < https://ukconstitutionallaw.org/2015/11/03/chintan-chandrachud-debating-the-njac-judgment-of-the-supreme-court-of-india-three-dimensions/> accessed 12 November 2017; Sengupta (n 96); 'Appointment of Judges and the Basic Structure Doctrine in India' , (2016) *Law Quarterly Review* 201 (Sengupta appeared for the Union of India in the case); Rehan Abeyratne 'Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective' (2016-2017) 49 *Geo. Wash. Int'l L. Rev.* 569.

108 Bhatia (n 107). See also Chandrachud (n 107); and Sengupta (n 96 and n 67).

The main judgment was written by Justice Khehar. In it, he held that the NJAC legislation did not provide for 'adequate representation to the judicial component in the NJAC', that the legislation was inadequate to preserve judicial primacy in the judicial selection and appointments process and that it therefore constituted a violation of the independence of the judiciary.[109] Justice Khehar acknowledged the remarks made by Dr B.R Ambedkar, amongst others, during the Constitutional Assembly debates indicating that an effective veto over judicial appointments by the CJ was as problematic as executive dominance over the process.[110] However, he went on to find that the Memoranda of Procedure for Appointment of Judges, Chief Justices and Supreme Court Judges devised following the decisions in the *First* and *Second Judges* cases did not give the CJ such power. Instead, the memoranda demanded that both judicial and executive actors participate in a consultative process and that, as their views were expressed in writing, this process was also transparent.[111] Justice Khehar reasoned that the allegation that the independence of the judiciary, part of the basic structure of the Constitution, had been infringed by the NJAC legislation had to be assessed by asking whether the legislation preserved judicial primacy in the selection and appointments process.[112] There were two main reasons for the conclusion that it did not.

First, Justice Khehar found that the idea that any two members of the NJAC could prevent the appointment of a candidate to be 'obnoxious' as it allowed two lay persons to 'override the collective wisdom of the Chief Justice of India and two Judges of the Supreme Court of India'.[113] Second, the presence of the Union Law Minister on the NJAC was problematic because the executive had a vested interest in a majority of the cases brought before the higher courts.[114] Ultimately, then, Khehar held, for the majority, that 'the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination'.[115] Having canvassed the approaches of a range of jurisdictions, Khehar noted that the trend was to move towards reducing the role of the executive in judicial appointments and the participation of various executive actors in the judicial appointments process in India was, therefore, an unacceptable 'retrograde step'.[116]

Concerns with the potential veto power of any two persons on the NJAC and with the participation of the Law Minister featured prominently in the separate, concurring judgments of Justices Lokur, Joseph and Goel.[117] It is noteworthy that several of the

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109 Khehar J, par. 158 (Order on Merits).

110 Discussed in section 2 above.

111 Khehar J, pars. 65-72 and 80 (Reference Order).

112 Khehar J, par. 150 (Order on Merits).

113 Khehar J, par. 156 (Order on Merits). In addition, as Art. 124A(1)(d) did not set out the qualifications for eminence, leaving the selection of these two individuals to the Chief Justice, Prime Minister and Leader of the Opposition in Parliament, it was found to be too vague to withstand constitutional scrutiny - Khehar J, par. 182 (Order on Merits).

114 Khehar J, par. 167 (Order on Merits).

115 Khehar J, par 169 (Order on Merits).

116 Khehar J, par. 178 (Order on Merits)

117 See Lokur J, pars. 484-86; 491, 509 and 523; Goel J, pars. 19.4 and 19.13; Joseph J, 909.

judges expressed criticism of the current process for judicial appointments. Justice Joseph noted that the current collegium system lacked transparency, accountability and objectivity.[118] Justice Lokur also referred to 'ills' in the system but noted that the political executive shared the blame for deficiencies with the collegium.[119] In his dissenting judgment, Justice Chelameswar referred to a general lack of transparency and accountability in the collegium system.[120] Justice Chelameswar's dissent was based in part on his disagreement with the premise that judicial primacy in the judicial appointments process is the only mean through which to secure judicial independence.[121] He noted that representatives of the executive and of civil society may each bring useful input and expertise to the process and that the formal participation of such individuals in the selection and appointment of judges is common in other democracies.[122] A key aspect of his finding that the Amendment withstood constitutional scrutiny was that it did not give the executive the primary say over judicial appointments as any proposals emanating from the Minster could be rejected by other members of the NJAC.[123]

Justice Chelameswar proposed a safeguard in response to the concern that disagreement over the appointment of eminent persons could block the appointments process. In terms of this safeguard, the three-person Committee responsible for selecting the eminent persons would refer three names under each category of eminent person to the full bench of the Supreme Court. The Court would then vote on these names, the two with the highest number of votes going on to become members of the NJAC.[124] This approach may be contrasted with the other judges' insistence on a far greater level of precision in the legislation in order for it to pass constitutional scrutiny.[125]

This difference between approaches points to a broader issue. As Chandrachud points out:

> The Court had a large set of interpretive tools at its disposal to deal with these and other concerns without striking down the amendment. For instance, it could have restricted the application of the veto provision to the judges alone, granted the Chief Justice a veto power in the process for appointing eminent persons, or defined 'eminent persons' more narrowly.[126]

Chandrachud is not convinced by Justice Lokur's opinion that the Court had to avoid these kinds of interpretive solutions because they would lead to judicial overreach.[127] He notes that concerns about judicial overreach are more likely to be present when the Court chooses to strike down an amendment to the Constitution passed by Parliament rather

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118 910-11.
119 Lokur J, par. 188.
120 Chelameswar J, pars. 106 and 119.
121 Chelameswar J, par. 98.
122 Chelameswar J, pars. 98 and 104.
123 Chelameswar J, par. 99. As the majority had found the Amendment to be unconstitutional, Justice Chelameswar did not feel the need to come to a conclusion on the constitutionality of the provision regarding the veto power of any two members of the NJAC which was contained in the Act. He did note, however, that he saw nothing 'inherently illegal' in this inclusion of this veto power (par. 116).
124 Chelameswar J, par. 108.
125 Most clearly expressed by Lokur J, par. 480.
126 Chandrachud (n 107).
127 Lokur J, par. 492.

than preserve its constitutionality by using interpretive tools ordinarily at the Court's disposal.[128] Chandrachud's view, borne out by the separate concurring judgments, is that the refusal to use interpretive tools stemmed from fundamental differences between the judges on key questions such as whether 'eminent persons' should be included on the NJAC and whether it was constitutionally permissible to require that one of the eminent persons come from a protected class.[129]

Even more significantly, there were serious inconsistencies in the judges' reasoning on the relationship between judicial independence, judicial primacy in the appointments process and the basic structure of the Constitution.[130] For Justices Khehar[131] and Goel,[132] judicial primacy was essential to judicial independence and, thus, part of the basic structure of the Constitution. Neither Justices Lokur nor Joseph reached the definitive conclusion that judicial primacy in the appointment of judges was an element of the basic structure of the Constitution.[133] Justice Joseph's judgment contained no reference to this issue at all. Justice Lokur went to great lengths to emphasise that the process for judicial appointments envisaged in the Constitution was, for the most part, a 'consultative and participatory' one involving various constitutional functionaries,[134] with 'limited primacy' being accorded to the view of the judiciary, as represented by the CJ.[135] He was clearly uncomfortable with the idea of primacy – either of the executive or the judiciary – in the appointments process.[136] Sengupta is of the view that the absence of a clear majority decision on the question of whether judicial primacy in the appointments system is essential to the preservation of judicial independence leaves the door open for Parliament to pass legislation introducing a judicial appointments commission with similar features to those of the NJAC at some point in the future.[137] Civil society support for a more transparent system for the appointment of judges may also keep up the pressure on government to introduce new legislation at some point.

Following the decision, the Court asked that government draft a Memorandum of Procedure on, amongst other things, how the existing collegium-based process for judicial appointments may be improved.[138] After a long period of negotiation between government and the judges about the substance of this memorandum,[139] there have been

128 Chandrachud (n 107).
129 Ibid.
130 See Sengupta (n 96) 28-9.
131 Par. 150.
132 Pars. 18.9 and 18.12.
133 Sengupta (n 96) 28-9.
134 Lokur J, par. 275.
135 Lokur J, par. 356.
136 Sengupta (n 96) 28.
137 Sengupta (n 96) 30.
138 Abeyratne (n 107) 610.
139 Alok Prashanna Kumar 'The Crisis in the Judiciary', *Economic and Political Weekly*, Vol. 52, Issue No. 20 (20 May 2017).

recent indications of progress.[140] However, there is, as yet, no final agreement.[141] This prolonged disagreement, taken together with the majority judges' refusal to apply interpretive tools to preserve the constitutionality of the legislation in the *NJAC* case, indicate that the issue of *how* to reform the judicial selection process in India is as controversial as ever. In this context, the South African experience of judicial appointments post-apartheid may hold valuable lessons on the relationship between judicial appointments and the independence of the judiciary.

There is little chance that a constitutional amendment changing the composition of the JSC will see the light of day in the current South African political climate. Thus, suggestions for reform have been of a more modest nature. One idea that has taken hold in South Africa in recent years is that of making the deliberations of the JSC public. Such an argument was made in a case brought against the JSC by the Helen Suzman Foundation in 2013.[142] In this case, the Foundation sought access to full recordings of the JSC's deliberations in deciding to put forward certain candidates and not others for vacancies in the Western Cape Division of the High Court. At the heart of the case was the Foundation's unhappiness with the JSC's decision to put forward Dolamo AJ rather than Jeremy Gauntlett SC for a permanent appointment to the bench. The Foundation argued that reasons provided to a candidate whose application has been unsuccessful were inadequate as the drafter of the reasons has the power to tailor the summary of the deliberations and exclude important or controversial information. Following an examination of comparable jurisdictions, the court held that it was not convinced by this argument. It highlighted the need to protect the privacy of applicants and to ensure deliberations be as candid as possible. The court also noted that candidates should not be deterred from taking part because of an overly public process. The National Association of Democratic Lawyers (NADEL) and the Democratic Governance and Rights Unit (DGRU) were admitted as *amicus curiae* in the case. Both rejected the idea that public deliberations were best practice when it came to judicial appointments by a commission. The case highlights the fact that South Africa's judicial selection and appointment processes are, by international standards, extremely transparent. But it also raises the question of how those aspects of the process that do take place in the public gaze may be strengthened.

There are three major, related issues here: one is clarity on the appointments criteria, the second is the question of how much information is available to the JSC and the public about the candidates; and the third is consistency around how interviews are conducted. DGRU is an applied research unit based at the University of Cape Town and has been active in promoting rigour and transparency in judicial appointments since

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140 See Dhananjay Mahapatral 'Supreme Court Collegium ends 1-year impasse by finalising judicial appointment procedure', *Times of India*, 15 March 2017 <http://timesofindia.indiatimes.com/> accessed 12 November 2017; and Bhadra Sinha 'Headway in New Memorandum of Procedure for Judges' Selection', *Hindustan Times*, 3 March 2017 <http://www.hindustantimes.com/> accessed 12 November 2017.

141 Maneesh Chhibber, Memorandum of Procedure Stuck, Collegium Starts to clear Names for HCs', *The Indian Express*, 10 April 2017 <http://indianexpress.com/> accessed 12 November 2017.

142 *Helen Suzman Foundation v Judicial Service Commission and others* (8647/2013) [2014] ZAWCHC 136 (5 September 2014).

around 2008. Although DGRU was one of the groups arguing against making deliberations of the JSC public in the *Helen Suzman case*, it has pressed for greater transparency with respect to the criteria the body uses in its selection. Initially, the JSC was not especially forthcoming on this. Using access to information legislation, DGRU made an application (through the Open Democracy Advice Centre) for the JSC to disclose its selection criteria– and received an extremely vague response in April 2009. The Commission said that the factors used

> [I]nclude but are not limited to the recommendation of the Judge President, the support of the candidate's professional body, the need to fulfill the constitutional mandate of the Judicial Service Commission so as to ensure transformation of the Bench to reflect the ethnic and gender composition of the population, the particular judicial needs of the division concerned, the candidate's age and range of expertise, including whether he/she has served as an acting judge in the division or at all, and the relative strengths and merits of the various candidates in relation to one another.'[143]

In a 2010 research report on Judicial Selection in South Africa, Susannah Cowen, an Advocate at the Cape and Johannesburg Bars and research associate of DGRU,[144] drew on best practice in a range of jurisdictions to set out much more comprehensive criteria.[145] In her discussion of what constitutes a 'fit and proper person', Cowen emphasised the point that a demonstrated commitment to constitutional values may provide a strong indication of independence from political institutions. The idea that commitment to constitutional values is an essential element of what makes a candidate fit for the job is underlined by the fact that the Constitution is avowedly transformative[146] – that it is based on the idea of 'a conscious attempt to create a nation that would espouse and accomplish substantive justice in its political and economic facets.'[147] The text itself contains references to the notion of the Constitution as an instrument of social change – primarily in the Preamble, section 1, section 7 and section 9(2). The inclusion of economic and social rights such as those in sections 26 (housing) and 27 (health care, food, water and social security) also speak to the notion of the Constitution as a blueprint for social equality.

In 2010, the JSC eventually decided to publish more detailed criteria for appointment. According to the JSC document, the main criteria in section 174 were to be interpreted as inviting the commissioners to ask the following questions about each candidate:

1. Is the particular applicant an appropriately qualified person?
2. Is he or she a fit and proper person, and
3. Would his or her appointment help to reflect the racial and gender

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143 S Cowen, 'Judicial Selection in South Africa', unpublished report (2010), at 7-8, commissioned by the Democratic Governance and Rights Unit, copy on file with the author.

144 Cowen (n 143) 5, n 10.

145 Cowen (n 143), chapters 3-6.

146 Cowen (n 143) 40.

147 E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race and Justice* 575, 576. See also Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

composition of South Africa?[148]

The commissioners would then move on to a set of supplementary criteria or questions:

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
(a) Technically competent
(b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
(a) Technically experienced
(b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?[149]

The published criteria are not just more comprehensive; they also make it clear that commitment to constitutional values or 'capacity to give expression to the values of the Constitution' is important in considering a candidate's suitability for appointment.

Transparency of the decision-making process was also a key concern in the case of *Judicial Service Commission v Cape Bar Council*.[150] The issue was the failure by the JSC to fill two of the three vacancies on the Western Cape High Court bench after interviewing seven candidates.[151] The fact that the one candidate appointed in that process was black and the other six white added fuel to the controversy.[152] Three of the short-listed candidates who were not appointed were supported by the Cape Bar Council as meeting the criteria for suitability in section 174 (1).[153] The JSC did not dispute the suitability of these candidates, stating simply that they were not appointed because they did not receive enough votes from the commissioners.[154] Writing for a unanimous court, Brand JA held:

> I am not suggesting that the JSC is under an obligation to give reasons under all circumstances for each and every one of the myriad of potential decisions it has to take. Suffice it for present purposes to say that: (a) since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a matter of general principle, it is obliged to give reasons for its decision not to do so; (b) the response that the particular candidate did not garner enough votes, does not meet that general obligation, because it amounts to no reason at all; (c) in a case such as this, where the undisputed facts gave rise to a *prima facie* inference that the decision not to recommend any of the suitable candidates was irrational, the failure by the JSC to adhere to its general duty to give reasons inevitably leads to confirmation of that *prima facie* inference. In the event, I agree with the finding by the court a quo that the failure by the JSC on 12 April 2011 not to fill any of the two vacancies on the bench of the WCHC was irrational and unlawful.[155]

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148 Malan (n 6) 1973.
149 Ngcobo (n 79) 14-15; Malan (n 6) 1973.
150 *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115.
151 Malan (n 6) 2013.
152 *Judicial Service Commission v Cape Bar Council* par. 2.
153 *Judicial Service Commission v Cape Bar Council* par. 38.
154 *Judicial Service Commission v Cape Bar Council* par. 39.
155 *Judicial Service Commission v Cape Bar Council* par. 51.

These attempts to bolster the transparency of the judicial appointments process are extremely positive and speak well of the state of judicial independence in the country. However, more recent and lasting critiques have been levelled against the manner on which JSC interviews are conducted, particularly when it comes to rigour and consistency of the questioning by commissioners. One of the major concerns related to early JSC interviews was an information gap with respect to the candidates' previous work. This was a significant issue in the Kliptown interviews for the selection of CJ and four new Constitutional Court judges which took place in September 2009.[156] A group of civil society organisations – including DGRU in the early stages of its development – attempted to fill this gap by providing a document containing a statistical analysis of judgments of candidates who had previously acted as judges, as well as extracts from their judgments. The document did not contain any information about the advocates (barristers) and academics who were being interviewed. Gathering material on the careers of these candidates would have taken a much longer time and the document referenced in the Kliptown proceedings was produced in a hurry. Cowen notes, however, that the JSC made extensive use of the material that was included in the report.[157]

As DGRU has expanded its work and become more established, it is fulfilling the role of information-gatherer in a more serious way. One of the unit's important contributions is the compilation of reports providing (in the main) summaries of selected judgments delivered by each of the candidates. DGRU makes these reports available to the JSC before the interviews take place. The reports are intended to provide non-partisan information for the JSC. Thus, as far as is possible, the reports use the judges' own words in summarising decisions and provide no commentary or analysis of their own. The reports also comment briefly on previous rounds of JSC interviews. Over the years, DGRU's reports have become increasingly detailed – they now include summaries of judgments handed down by advocates who have acted as judges; and extracts from journal articles authored by candidates.[158] Since February 2013, DGRU researchers have presented the summarised judgments in thematic groups.[159] This methodological shift may prove to be useful – not only because it highlights the candidates' substantive findings in particular areas but provides the JSC with a sense of which candidates have experience and strength in particular areas of the law. Cowen's point regarding a dearth of information about candidates who have not served as judges in either a permanent or acting capacity holds and her suggestion that applicants be required to provide more

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156 Cowen (n 143) 82.

157 Cowen (n 143) 82-3.

158 The reports are available at <http://www.dgru.uct.ac.za/dgru/reports/researchreports> accessed 12 November 2017. The Unit's methodology continues to evolve, partly in response to feedback from stakeholders such as the JSC itself. The April 2017 report does not contain all judgments handed down by the candidates. Rather, it consists of summaries of what DGRU believe to be the most significant decisions, arranged by theme e.g. civil and political rights. The Unit remains reluctant to provide its own commentary on the strengths and weaknesses of the judgments. However, the April 2017 report does contain academic criticism of various judicial decisions.

159 'Submission and Research Report on the Judicial Records of Nominees for Appointment to the Constitutional Court, February 2013.

extensive source material in their applications deserves to be taken seriously.[160] Overall, though, the 'information gap' with respect to candidates' suitability is being much more effectively addressed.

A more worrying critique relates to the inconsistency in the approach taken by JSC commissioners to the questioning of candidates – long, arduous interviews for certain candidates and a much gentler approach to questioning others.[161] Some suggest that the difference is rooted in whether the particular candidate is perceived to be more independent-minded with the most grueling interviews reserved for those in this category.[162] Others see the difference in approach as a reflection of profound disagreement amongst the commissioners on how the appointment criteria are to be interpreted and applied.[163] As noted earlier, the current CJ Mogoeng Mogoeng's appointment in 2011 was mired in controversy.[164] Objections to his nomination related to a series of judgments handed down by him that were both sexist and indicative of a lack of understanding of changes wrought by the transition to a constitutional democracy - for instance that marital rape is now recognised as a crime in South Africa.[165] Furthermore, the CJ is a lay pastor at Winners' Chapel, the local branch of David Oyedepo Ministries International, which considers homosexuality to be a disease which can be cured.[166] In the context of a Constitution that explicitly prohibits discrimination on the basis of sexual orientation, this is deeply problematic.

Observers were divided on whether Justice Mogoeng's interview was sufficiently rigorous but there are some who claim that the questions were, for the most part, undemanding.[167] He was not seriously interrogated on his problematic judicial decisions

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160 Cowen (n 143) at 83-4. Cowen notes that the pool of information ought to be widened to include unreported judgments, heads of argument, newspaper articles, speeches and so on. Furthermore, exclusive reliance should not be placed on material provided by the candidate. Ideally, the information should be supplemented by evaluators conducting independent internet searches and through the participation of interest groups – see page 84 of the report.

161 Olivier (n 16)148. See also Richard Calland and Chris Oxtoby 'Rational, consistent process for choosing judges needed' *Business Day*, 18 April 2013; Malan (n 6) 1974-75.

162 Malan (n 6) 1974-75.

163 Calland and Oxtoby (n 161).

164 As noted earlier in this article, the President appoints the Chief Justice after consultation with the JSC. As part of that process of consultation, the JSC interviews nominees for the CJ position – see L Siyo and JC Mubangizi 'The Independence of South African Judges: A Constitutional and Legislative Perspective' 2015 (18) 4 *Potchefstroom Electronic Law Journal* 817, 823.

165 See, for instance, the submissions of Section 27 and the Women's Legal Centre available on the website of the Democratic Governance and Rights Unit – <http://www.dgru.uct.ac.za/dgru/reports/submissions> accessed 12 April 2017. See also Olivier (n 16) 142.

166 Section 27 submission (n 165). See also 'Zuma appoints controversial judge Mogoeng to top post', 8 September 2011 < https://www.bbc.co.uk> accessed 12 November 2017.

167 A transcript of the interview is available at <http://constitutionallyspeaking.co.za/transcript-of-jsc-interview-with-justice-mogoeng-2009/> accessed on 9 August 2017. See Stuart Graham 'Mogoeng grilled during interviews', 4 September 2011 <http://www.iol.co.za/news/politics/mogoeng-grilled-during-interviews-1130977> accessed on 9 August 2017. For a different view, see Press Statement from Section 27, Sonke Gender Justice Network, Lesbian and Gay Equality Project and the Treatment Action Campaign 'JSC Interview Raises Concerns About Judicial Appointment Process', 6 September 2011< http://www.tac.org.za/community/node/3151> accessed 12 November 2017.

on rape, for example. This has fueled a perception that the interviews are window dressing, the important decisions about appointments having been made before they take place. Calland and Oxtoby suggest that this may be one reason for the current difficulty with getting qualified individuals to apply for judicial positions in the country.[168] Despite these concerns about the interview process and the manner in which the current CJ was appointed, it should be borne in mind that the very public nature of the process and the criticism has made an important contribution to protecting judicial independence.

For one thing, the public uproar surrounding the proceedings resulted in an unusually well-attended interview which, as Calland points out, can only be a good thing from the perspective of accountability to the public.[169] The CJ's statements and decisions on gender and sexual orientation are likely to be heavily scrutinised and, again, this is no bad thing. Following his appointment, Mogoeng CJ took to the media to underline his commitment to the Constitution's protection of equality and, specifically, non-discrimination on the basis of sexual orientation.[170] Finally, whatever his relationship with the government before his appointment, the CJ has subsequently voiced disenchantment over executive backtracking on the creation of courts' administration independent of the executive.[171] As Calland states, the executive has 'starved the Office of the Chief Justice (OCJ) of funding, placing one of its own staff (a senior justice department official) into the crucial position of secretary-general of the OCJ. This has strengthened Mogoeng's determination to stand up to the executive and he finally lost his cool and expressed his anger at a meeting with the president and the minister of justice in early 2013.'[172]

Since 2012, DGRU reports have suggested that rigour and consistency in the interview process are improving. Thus, the Unit's April 2014 submission commended the 'fair and balanced questioning' in the October 2013 interviews.[173] A similar point was made in DGRU's September 2015 submission regarding the rigorous interviews conducted in April 2015, particularly with respect to the interviews for leadership

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168 'Crisis of confidence at the Concourt' *The Argus*, 18 March 2012 <http://www.uct.ac.za/usr/dgru/downloads/concourt.pdf> accessed 12 November 2017. On the dearth of Constitutional Court candidates, see further DGRU Submission and Research Report on the Judicial Record of the Nominees for Appointment to the Supreme Court of Appeal and High Court, April 2016, 5.

169 Calland (n 9). The post-2011 period has also witnessed enhanced civil society interest in judicial appointments. In 2014, for instance, a group of organisations formed a loose coalition, Judges Matter, which monitors judicial selection and appointment. Its website also makes available transcripts of judicial interviews and video clips from interviews – see http://www.judgesmatter.co.za.

170 Scott Roberts 'Chief Justice: I will protect gay rights despite being against gay marriage' <http://www.pinknews.co.uk/2014/06/04/chief-justice-of-south-africa-i-will-protect-gay-rights> accessed on 9 August 2017.

171 Calland (n 9).

172 Calland (n 9).

173 DGRU Submission and Research Report on the Judicial Record of the Nominees for Appointment to the Supreme Court of Appeal, Electoral Court, High Court and Labour Appeal Court, April 2014, 5.

positions on the courts.[174] Despite these promising signs, a lack of clarity over selection criteria used by the JSC is an enduring worry. Budlender notes that, when the first judges of the Constitutional Court were appointed in 1994, demonstrated commitment to human rights was a pre-requisite for appointment. This is 'entirely appropriate under a Constitution in which a commitment to human rights suffuses the founding values entirely appropriate under a Constitution in which a commitment to human rights suffuses the founding values'.[175] The supplementary criteria referred to in the JSC's 2010 criteria, referred to above, support the notion that candidates should be able to give expression to the values of the Constitution. Yet commentators have noted that a candidate's commitment to human rights may be viewed as suspect by the JSC.[176] Thus, in relation to the April 2014 interviews, Oxtoby notes the comment by one commissioner that she found it 'disturbing' that candidates with 'fervent human rights activist tendencies' wished to be judges.[177] Some candidates with a strong record of commitment to human rights continue to be appointed but the comment does raise concerns about the JSC's own understanding and application of selection criteria.

Arguably, the underlying issue here is not commitment to human rights *per se* but the likelihood of the particular candidate finding against government, the idea being that in the current South African climate, human rights activism would place an individual in opposition to various governmental policies. Referring to an instance of a candidate being told that he seemed to find against government in a large number of cases and then being asked to cite examples of cases where he had found for the government, Oxtoby raises the concern that commissioners' questions about candidates' understanding of the separation of powers may simply be intended to identify and exclude those who appear too independent-minded.[178] Similarly, a commitment to transformation (demonstrated by an advocate briefing colleagues from 'previously disadvantaged backgrounds', for instance) is viewed in a positive light provided that such commitment is not expressed in a manner that could be seen to be hostile to government.[179]

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174 DGRU Submission and Research Report on the Judicial Record of the Nominees for Appointment to the High Court and Labour Court, September 2015, 5. It should be noted that inconsistency was raised as an issue in DGRU's October 2014 report. This is an indication that, despite improvements, consistency remains something of a challenge and is an issue for research and pressure groups to keep an eye on. The length of interviews is also a cause for concern. Increased rigour of the questioning has sometimes resulted in much lengthier interviews and less predictability about when they will begin and end - see the April 2015 report, 7; and the September 2015 report, 5-6.

175 '20 Years of Democracy: The State of Human Rights in South Africa' (2014) 25 *Stellenbosch L. Rev.* 439, 448.

176 Budlender (n 79) 448; and Oxtoby 'A Week in the Life of the JSC', blogpost on *The Con* , 9 June 2014 <http://www.theconmag.co.za/2014/06/09/a-week-in-the-life-of-the-jsc/> accessed 12 November 2017. Interestingly, in discussion documents from March of this year, the African National Congress reportedly wants "judges with a progressive philosophy and who advance judicial activism to give effect to social transformation to be appointed to the Bench" and for JSC commissioners to review the selection criteria with this in mind, <http://www.judgesmatter.co.za/opinions/anc-to-examine-criteria-for-judges/> accessed 12 November 2017. Whether any changes flow from this and what such changes would mean in practice remain to be seen.

177 Oxtoby (n 176).

178 Ibid.

179 Ibid.

5. South Africa: a cautionary tale?

On paper, the South African system of judicial selection and appointment is dominated by the executive. When it comes to appointing the CJ, Deputy Chief Justice, President of the SCA and Deputy-President of the SCA, this dominance is most pronounced. It is up to the President to select individuals for these positions, the only formal limitation on this power being the requirement of consultation with the JSC (and with the leader of parties represented in the National Assembly with respect to the CJ and DCJ). This concentration of power in the hands of the President has been criticised – perhaps most prominently by then Deputy Chief Justice Dikgang Moseneke.[180] The fact that politicians and political appointees make up a majority of the commissioners on the JSC is also cause for some unease. Disquiet over these limitations on judicial independence arising from the appointments process have been heightened by several instances of more explicit executive challenges to judicial power.

One notable early example of such a challenge arose in relation to the *Treatment Action Campaign* case,[181] dealing with a challenge to government's decision to limit the provision of the anti-retroviral drug nevirapine to prevent mother-to-child transmission of the HI virus to certain pilot sites. After the High Court had ruled against government, the then Minister of Health, Manto Tshabalala-Msimang was asked in a televised interview whether government would abide by the court's order. She answered that it would not, explaining that:

> My own view is that the judiciary cannot prescribe from the bench - and that we have a regulatory authority in this country that is interacting with the regulatory authority FDA [Food and Drugs Administration] of the USA and I think we must allow them to assist us in reaching conclusions…I think the court and judiciary must also listen to the regulatory authority both of this country and the regulatory authority of the US.' [182]

Her response caused a furore in the country and she was quickly made to retract the statement.[183] Furthermore, her statement did not prevent the Constitutional Court from finding against government when the High Court's decision was appealed in what Budlender has referred to as '[t]he most famous incident in our country of the courts declaring a policy inconsistent with the Constitution'.[184]

Since then, and particularly during Jacob Zuma's presidency, the executive has become more vocal in its criticism of the courts and less apologetic for its statements critiquing particular judicial decisions and the judiciary as an institution. Thus, for instance, Siyo and Mubangizi refer to 'periodic statements by politicians about the need

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180 Siyo and Mubangizi (n 164) 827-28.

181 *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)* 2002 (10) BCLR 1033 (CC).

182 'What did Manto and Maduna Really Say?', 27 March 2002 <http://www.iol.co.za/news/south-africa/what-did-manto-and-maduna-really-say-84013> accessed 12 November 2017. See also Theunis Roux *The Politics of Principle* (CUP 2013) 298.

183 Roux (n 182) 298.

184 Geoff Budlender 'People's Power and the Courts: Bram Fischer Memorial Lecture 2011' (2011) 27 *South African Journal on Human Rights* 582, 586.

to review the judgments of the Constitutional Court with a view to assessing the need to make changes to the Constitution.'[185] The repeated criticism of the judiciary by the executive led heads of courts to hold an extraordinary meeting in 2015, after which they issued the following statement:

> The Heads of Court and senior judges of all divisions have requested the Chief Justice, as head of the judiciary to meet with the head of state to point out and discuss the dangers of the repeated and unfounded criticism of the judiciary. Criticism of that kind has the potential to delegitimise the courts. Courts serve a public purpose and should not be undermined.[186]

At the same time, it is worth noting both that executive criticism of the judiciary is to be expected and is not unique to South Africa. More importantly, this criticism has not deterred South African courts – the Constitutional Court and the Supreme Court of Appeal, in particular – from robustly scrutinising executive action and finding against government in a number of high-profile decisions.[187] One recent and very significant decision was *Economic Freedom Fighters v Speaker of the National Assembly (the Nkandla* case*)*,[188] in which Mogoeng CJ found, for a unanimous Constitutional Court, that President Zuma's failure to comply with the Public Protector's order to reimburse the National Treasury for those improvements made to his home that were not security-related was unconstitutional.[189] Furthermore, Ellmann points out that, despite governmental criticism:

> The courts enjoy some considerable degree of respect—and that position gives the courts some potential to speak effectively to power, even though the ANC's political power is still immense. Moreover, this respect is likely founded on the courts' being the objective voice of the law and of the culture of justification—and these sources of the courts' legitimacy themselves generate the courts' obligation to continue to act.[190]

On the whole, then, whilst we cannot afford to be complacent about the future of judicial independence and the rule of law in South Africa, over twenty years after the country's first democratic elections, the courts are still able to fulfil their constitutional

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185 Siyo and Mubangizi (n 164) 838.

186 Lindi Masinga 'Judiciary responds to criticism of courts', 8 July 2015, <http://www.iol.co.za/news/crime-courts/judiciary-responds-to-criticism-of-courts-1882462> accessed 12 November 2017. This and other challenges to judicial independence are discussed in more detail by Siyo and Mubangizi (n 159) 835-39. See also Natasha Marrian 'Executive and Judiciary Discuss "Criticism of Judges"' *Business Day*, 27 August 2015; and Morné Olivier 'Competing Notions of the Judiciary's Place in the Post-apartheid Constitutional Dispensation' in Hugh Corder, Veronica Federico and Romano Orrù (eds.) *The Quest for Constitutionalism: South African Since 1994* (Routledge 2016) 69.

187 Mark S Kende 'Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers' 2014 (23) *Transnational Law and Contemporary Problems* 35. By contrast, Issacharoff, writing about how courts should respond to threats to 'democratic contestation' from a dominant party, describes the South African Constitutional Court's approach as being 'non-confrontational' and based on 'partial reasoning' (n 10) 590 and 605.

188 [2016] ZACC 11.

189 For a discussion of the background to the case and the judgment, see Robin Palmer 'South Africa: Constitutional Court takes stand against corruption and reaffirms principles of the rule of law in the landmark Nkandla case' (2016) *Public Law* 519.

190 Stephen Ellmann (2015-16) 60 'The Struggle for the Rule of Law in South Africa' *New York Law School Law Review* 57, 102.

duty without fear, favour or prejudice. When it comes to the judicial appointments system, developments in South Africa are indicative of the fact that formal safeguards of independence such as ensuring that a range of actors have a genuine say over which candidates are ultimately selected are important. However, even in a system such as South Africa's where judicial selection is formally weighted in favour of the will of the politicians, transparency of the process has acted as a hugely important assurance of judicial independence. Scrutiny of the President's actions and the practices of the JSC by the media, academics, civil society and the public is robust and has proved to be effective at key moments.

6. Conclusion

Based on his study of judicial appointments processes in Commonwealth jurisdictions, Jan van Zyl Smit notes that, when it comes to the composition of commissions, the tide 'is turning towards the balanced model'. By 'balanced model', van Zyl Smit is referring to commissions in which judges do not constitute a majority of commission members. Rather, the majority of members is made up 'of judges and lawyers chosen by the practising or academic branches of the legal profession'.[191] Even here, he acknowledges that members of the judiciary and senior members of the legal profession could act together to protected vested common interests.[192] This underscores the fact that there is no perfect judicial appointments system, capable of ensuring – in and of itself – that judicial independence is secured. Furthermore, any consideration of possible routes to reform must take account of practical realities. As noted earlier, any reform involving a constitutional amendment in South Africa is unlikely to gain traction for as long as the ANC maintains its majority in Parliament. In this context, clarity of appointments criteria and access to relevant information about candidates are emerging organically – through public pressure, the work of organisations and lobbying by interest groups.

It is not clear what set of circumstances would allow for successful reform of the judicial selection and appointments system in India. What is worrying about the Indian Supreme Court's *NJAC* judgment is its lack of nuance about what judicial independence means. The NJAC would not have had a majority of politicians as its members. Given that the Prime Minister and the Leader of the Opposition would have competing political agendas, the worry that they would act together to pressure the CJ into choosing particular individuals to act as commissioners was not convincing. The idea that the Prime Minister could act together with one of the 'eminent' persons to block particular appointments was of greater concern. However, there are two points to be made here. First, experience of judicial appointments in India has shown that the CJ is not immune from pressure from the ruling party in the current collegium system. Second, and more importantly, the flaw could have been addressed if the criteria for 'eminent persons' were made more clear. But these issues were not properly canvassed in the judgment. At least two of the judges – Justices Khehar and Goel – were explicitly unwilling to move away

191 van Zyl Smit (n 19) 60, 76.

192 Ibid.

from a system that ensured judicial primacy over judicial appointments. And none of the four judges who delivered the majority judgment were willing to use a remedy that would have allowed government the opportunity to address deficiencies in the legislation such as the lack of clarity over appointments criteria. As a result of this judgment, the opaque collegium system for judicial appointments in India continues in force and it may be some time before agreement is reached on reform.

For a country like India where the blueprint for a new judicial appointments system is still open to debate, judicial independence would not be well-served by a system that simply replaces judicial primacy with political dominance. The history of South Africa over the last twenty years shows that concentrating power over judicial appointments in the hands of the President or allowing politicians a decisive say over which candidates are ultimately selected can lead to candidates being appointed on the basis of a perception that they will be more 'friendly' to governmental policies. Even if that perception is not borne out in reality, the danger is a loss of respect for the judiciary and the loss of the expertise of more obviously independent-minded candidates. But, and perhaps more importantly, the South African experience also attests to the importance of having a transparent process – the public nature of the JSC interviews have acted as a hugely important safeguard of judicial independence. Clarity of appointments criteria and ensuring that the body responsible for selection of judges has access to a wide range of information about the candidates have also emerged as key ingredients for a healthy judicial appointments system. This lends credence to the argument by critics of the NJAC legislation that it was simply too vague on these important matters. It is difficult to say what the composition of a potential future commission would have to be in order to pass constitutional muster as there is so little guidance in the judgment on this. What is clear, though, is that the composition of any future judicial appointments commission is only one part of the equation. Much greater attention must be paid to clarity of the criteria for appointment as well as transparency of, and public participation in, the decision making process.